No. 80-1079

IN THE

Supreme Court of the United States

October Term, 1980

RAGU FOODS, INC. and CHESEBROUGH POND'S, INC.,

Petitioners,

vs.

HUNT-WESSON FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

Did the Court of Appeals properly reverse the dismissal of a complaint alleging violations of the Sherman Act on the basis that:

(1) an allegation that the defendant held a market share of 65% was sufficient from which to infer an allegation of market power; and,

(2) acts of unfair competition could constitute a violation of the Sherman Act if committed by a firm with market power.

List of Related Corporations.

Parent	—	Hunt Foods and Industries, Inc. Norton Simon Inc.
Affiliates	—	Avis, Inc. Canada Dry Corporation Glass Containers Corporation Halston Enterprises, Inc. Max Factor & Co. McCall Pattern Company Somerset Importers, Ltd. United C an Company

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Ninth Circuit Court of Appeals is reported at 627 F.2d 919 (9th Cir. 1980).

Statement of Case.

Plaintiff Hunt-Wesson Foods, Inc. (hereinafter "Hunt"), is a Delaware corporation with its principal place of business in Fullerton, California. It is engaged in the production and distribution of a wide variety of food items, including commercially prepared spaghetti sauce sold under the brand name Hunt's "Prima Salsa" Extra Thick and Zesty spaghetti sauce.

Defendant Ragu Foods, Inc. (hereinafter "Ragu"), is a corporation with its principal place of business in Rochester, New York. It is engaged in the production and distribution of commercially prepared spaghetti sauce sold under the brand name "Ragu" spaghetti sauce. Ragu is a wholly-owned subsidiary of Chesebrough-Pond's, Inc.

Defendant Chesebrough-Pond's, Inc. (hereinafter "Chesebrough"), is a New York corporation with its principal place of business in Greenwich, Connecticut. It is a diversified manufacturer and marketer of consumer products, including packaged foods, children's clothing, health and beauty products, fragrances and hospital products.

Ragu is the dominant producer of commercially prepared spaghetti sauce in the United States. Reliable market survey reports indicate that Ragu's share of the national market increased steadily from 61.4% in 1973 to 65.6% in 1975.

In December 1973, Hunt had conceived plans to enter the commercially prepared spaghetti sauce market. At least five major food corporations, including Heinz, Kraft, General Mills, Del Monte and Hunt itself, had previously attempted to penetrate this market but had been unsuccessful. Therefore, Hunt focused upon the development of a sauce that would attract consumer demand by its distinctive qualities. The sauce which was eventually developed bore the trade name Hunt's "Prima Salsa" and was distinguished from all other sauces then on the market by its thicker consistency and spicier taste. The labeling and advertising of the product prominently featured the words "Extra Thick and Zesty."

In August 1975, Hunt began to test market this new product in two areas: The Syracuse/Buffalo/Rochester, New York area, and the Cincinnati/Dayton, Ohio area. Because the average supermarket contains over 8,500 items and is offered more than 6,500 new products each year, the introduction of a new product is carefully orchestrated in order to insure that the product quickly develops a distinctive identity, obtains maximum distribution on grocer's shelves and gains consumer acceptance. Accordingly, Hunt had diligently researched and planned all aspects of the test market introduction of Hunt's "Prima Salsa," including

distinctive labeling and advertising, convenient packaging, competitive wholesale prices and, most importantly, a thicker and zestier sauce.

Defendants, however, immediately sought to disrupt the test marketing of Hunt's "Prima Salsa" with tactics designed to maintain its monopoly position and stymie Hunt's efforts to enter the market. Ragu sought to block Hunt's entry by a variety of tactics, beginning with discounts and promotional allowances. Although these allowances were ostensibly given to reimburse the grocer for the cost of promoting Ragu's products, Hunt alleged that these allowances were, in effect, direct price reductions aimed primarily at Hunt's test marketing areas. Ragu's products were effectively sold at discounted prices based on promotional allowances for nearly the entire length of Hunt's test marketing program.

In addition, Ragu introduced a new variation of the introductory discount to further reduce its prices to certain grocers. Traditionally, introductory discounts are granted to all customers at the time that a product is first introduced into a particular geographic area in order to stimulate initial purchases. Although all of Ragu's spaghetti sauces had long since been introduced, Ragu offered certain introductory discounts only in the test market areas and offered them to any grocer who purchased a variety of Ragu sauce which he had not purchased previously. The intent and effect of these discounts was to exclude Hunt from shelf space by expanding Ragu's shelf space with new, and hence discounted, sizes or flavors.

On the consumer front, Ragu substantially increased the number and value of its consumer giveaway and coupon offers in Hunt's test market areas. Many of these offers gave consumers up to 33% off the regular price.

Despite the efforts of defendants to thwart Hunt's test market, Hunt proceeded with plans for a national introduction of its spaghetti sauce. In June 1976, with knowledge of Hunt's plans, defendant Ragu announced to the grocery trade the national introduction of its thicker and spicier spaghetti sauce under the name Ragu Extra Thick and Zesty. This product was announced prematurely and introduced without prior test marketing in an attempt to disrupt the national rollout of Hunt's spaghetti sauce.

Concerned over the cumulative effect of all these maneuvers, believing that they were part of a plan and program designed to prevent Hunt from gaining a maintainable toehold in the market and that they were based not on the competitive merits of Ragu's product but on anticompetitive tactics and the power conferred by its predominant, entrenched market position, Hunt charged that in undertaking the series of acts described above, Ragu and Chesebrough had violated Sections 1 and 2 of the Sherman Act and had engaged in unfair methods of competition. Hunt also charged that Ragu had violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

On December 16, 1976, the district court dismissed the Sherman Act Section 2 charges of monopolization, attempt to monopolize and conspiracy to monopolize on the theory that (a) the alleged acts of copying Hunt's slogan and advertising for a prematurely announced Ragu product, even if they were acts of unfair competition, did not constitute a Sherman Act violation, and (b) Hunt's "bare allegation" that Ragu held 65% of the market was insufficient to allege either the monopoly power required for monopolization or the dangerous probability of success required for attempt to monopolize. The district court then concluded that "plaintiff's ability to establish Sherman Act violations de-

pends on its ability to establish substantive violations of the Robinson-Patman Act, 15 U.S.C. §13(a)."

Thereafter, defendants filed a motion for summary judgment on the Robinson-Patman claim asserting that, if successful, it would also vitiate Hunt's remaining Sherman 1 claim in accordance with the Court's order and then require dismissal of the pendent unfair competition claim for lack of jurisdiction.

On April 27, 1977, the district court granted their motion for summary judgment. The district court specifically held that there had been no legally cognizable geographic price discrimination, that the allegedly discriminatory promotional allowances had been legitimately made available to competing trade purchasers, and that the allegedly discriminatory introductory discounts were *de minimis*. On this basis, the district court summarily disposed of Hunt's Robinson-Patman claim and, in accordance with its earlier opinion, granted summary judgment on the Sherman Act claims as well. It then dismissed the pendent unfair competition charge for lack of jurisdiction.

On appeal to the Ninth Circuit Court of Appeals, the District Court's dismissal of the Sherman Act claims was reversed and its grant of summary judgment as to the Robinson-Patman pricing claims was affirmed.

ARGUMENT.

I.

The Ninth Circuit Properly Concluded That Hunt's Allegation That Ragu Held a 65% Market Share Was a Sufficient Pleading of Market Power to Sustain Its Sherman Act Claim.

Dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim is proper only if it is clear that the plaintiff could prove no set of facts within the framework of the complaint that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-48 (1957); *California Dump Truck Owners Ass'n. v. Associated General Contractors of America, Inc.,* 562 F.2d 607, 615 (9th Cir. 1977).

Against this standard, the Ninth Circuit correctly held that Hunt had properly stated a claim when it alleged that Ragu held 65% of the market thereby allowing the inference of the existence of market power. This conclusion was neither novel nor a departure from precedential case law.

In *United States v. Grinnell Corp.,* 384 U.S. 563, 571 (1966), this Court recognized that "the existence of monopoly power ordinarily may be inferred from the predominant share of the market." Consistent with that holding, courts have looked to market share to determine the existence of market power. *Greyhound Computer Corp. v. International Business Machines Corp.,* 559 F.2d 488 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978) 60-70 per cent share); *Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc.,* 526 F.2d 1196 (9th Cir. 1975), *cert. denied,* 425 U.S. 959 (1976) (45-70 per cent share); *Hiland Dairy, Inc. v. Kroger Co.,* 402 F.2d 968 (8th Cir. 1968), *cert. denied,* 395 U.S. 961 (1969) (20 per cent share did not reflect market power).

In a reasoned application of this precedent to Hunt's allegation that Ragu held a 65% market share, which was increasing, the Court of Appeals concluded that:

> "While market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence. Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal. With nothing but Hunt's complaint before us, we cannot say that allegations that Ragu had a 65 per cent market share, and that the share was increasing, could not under any market conditions provide a basis for inferring the requisite market power." (citations omitted) 627 F.2d 919, 925 (9th Cir. 1980)

Considering the fact that the market power issue was presented only on the pleadings and that this Court has clearly stated its objection to the dismissal of antitrust cases before a full record can be developed, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976), the Ninth Circuit's reversal of the district court was proper in order to allow a considered assessment whether Ragu's 65% market share did, in fact, give it the power to control prices or exclude competition. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956)

II.

The Ninth Circuit Properly Concluded That Unfair Competitive Activities Committed by a Firm With Market Power Will Support an Allegation That the Defendants Violated the Sherman Act.

The Court of Appeal's conclusion that allegations of acts of unfair competition committed by a firm with market

power are sufficient to resist a motion to dismiss before plaintiff has had discovery is firmly grounded on prior law.

In *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979), the court acknowledged that conduct, otherwise outside the reach of the antitrust laws, may engender antitrust liability when employed by a dominant firm to lessen competition. Holding that unfairly competitive advertising schemes violate the Sherman Act, it stated that excessive promotional spending by a dominant firm should normally be deemed predatory when its timing coincides with the appearance of a new entrant. *Id.* at 888 Such predation has no other economic justification and results in the destruction of competition.

The Eighth Circuit has similarly held that an advertising campaign mounted by a firm with market power and utilizing unfair and deceptive statements constitutes a violation of the Sherman Act. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1266-1270 (8th Cir. 1980); *accord, Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 556 (7th Cir. 1980); *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Peryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618, 621-22 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966); *Power Replacements Corp. v. Air Preheater Co.*, 356 F.Supp. 872, 897 (E.D.Pa. 1973)

Ragu's assertion that the injuries alleged in this complaint are not the "type the antitrust laws are intended to prevent" enunciated by this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) are specious. Unlike *Brunswick*, where the plaintiff was injured as a by-product of the preservation of competition, here the allegations are that Ragu, with intent to preserve its market dominance and to eliminate competition from Hunt, en-

gaged in a variety of unfair competitive acts consisting of copying, severe price cutting in selected markets, unfair and misleading advertising and giveaways. Moreover, plaintiff alleged that these acts were all part of a plan and program designed to prevent Hunt from acquiring a toehold in the market. Clearly, such conduct is "the type the antitrust laws are intended to prevent" and the *Brunswick* test is satisfied.

Ragu also invokes the spirit of *Brunswick* by asserting that if any harm resulted to Hunt it was the nature of the acts rather than the actor or its market share which caused the injury. This rationale is fallacious, however, because one cannot determine whether acts are anticompetitive without assessing their impact in terms of their perpetrator and its market power. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 707 (1962)

Finally, the petitioner attempts to assert the lack of "antitrust injury" by analogizing the instant factual setting to the situation in *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979). In that case, the court held that Calcomp had not established an antitrust injury because the price cutting there attacked was not directed at Calcomp but at companies in other markets. As such, "an indirect ripple effect is not sufficient to allow Calcomp to sue. . . ." *Id.* at 732. Obviously, the acts of unfair competition alleged to be committed by Ragu were prompted by Hunt's entry into the marketplace and were specifically designed to impede competition by Hunt in the commercially prepared spaghetti sauce market. This distinction alone vitiates Ragu's reliance on *Calcomp*. Moreover, there is no inconsistency within the Ninth Circuit in respect to the legal standard governing the legality of behavior by firms having dominant market power. The decisions in this case, and in *CalComp, Purex, Greyhound Computer Corporation* and *Sunkist, supra*, can

all be reduced to a simple common denominator: the monopolist or firm having dominant market power may react to competitors and seek legitimately to preserve its market share, but cannot engage in conduct which is unnecessarily restrictive of competition because it is calculated to crush competitors. Here, the complaint alleged conduct falling into the latter category and, the Ninth Circuit, fully cognizant of its prior decisions analyzing Section 2 of the Sherman Act, including *CalComp*, concluded that this complaint stated a claim.

Ragu's attempt to place Hunt's injuries outside the scope of the antitrust laws by asserting that the court of appeals mischaracterized the nature of Hunt's alleged injuries must fail. The Ninth Circuit properly remanded the issue for trial.

III.

The Ninth Circuit's Ruling Does Not Compromise Ragu's First Amendment Rights.

By claiming that the decision of the court of appeals fails to protect Ragu's First Amendment rights, Ragu totally ignores the fact that protection of commercial speech is not without limitation. Untruthful, deceptive or misleading speech, commercial or otherwise has never been protected. *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 772 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49 & n.10 (1961) Ragu's product was clearly imitative of that marketed by Hunt, and its advertising schemes, calculated at capitalizing on this similarity, were demonstrably deceptive. As such, Hunt can properly allege its impropriety without running afoul of constitutional guarantees of free speech.

Conclusion.

Petitioners' request for a writ of certiorari presents no issues which are ripe for consideration by this Court. The decision of the court of appeals properly rectified the premature dismissal of Hunt's Sherman Act claims and remanded the matter to the district court so that a record could be developed upon which market power and anticompetitive impact could properly be assessed. The court of appeals, reviewing the allegations of the complaint and applying the "unnecessarily restrictive of competition" test (derived from a line of Ninth Circuit decisions), properly concluded that the complaint stated a claim for relief. This ruling was well within the bounds of accepted procedural and substantive antitrust principles, and is not in conflict either with prior decisions of the Ninth Circuit or decisions of any other circuit. The reversal of the district court's dismissal of the complaint reflects no novel ruling in the enforcement of the antitrust laws and does not, therefore, merit the attention of this Court. Accordingly, we submit that the petition for writ of certiorari should be denied.

Dated: January 28, 1981.

Respectfully submitted,

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